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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 LARRY GLENN MALLORY,
12 Inmate Booking No. 12527706,

13 Plaintiff,

14
15 vs.
16

17 WILLIAM GORE; JIM MADSEN;
18 ZACHARY YARLING; SAN DIEGO
19 COUNTY; SAN DIEGO COUNTY
20 ATTORNEY; ZACHARY BAKER;
21 DEPUTY WHITE; GBDF,

22 Defendants.
23

Civil No. 13cv0275 IEG (DHB)

ORDER:

**1) DISMISSING DEFENDANTS
GORE, MADSEN, SAN DIEGO
COUNTY, SAN DIEGO COUNTY
ATTORNEY, GBDF;**

AND

**2) DIRECTING U.S. MARSHAL TO
EFFECT SERVICE OF SECOND
AMENDED COMPLAINT
PURSUANT TO
FED.R.CIV.P. 4(c)(3)
& 28 U.S.C. § 1915(d)**

24 **Procedural History**

25 **I.**

26 On February 1, 2013, Larry Mallory ("Plaintiff"), an inmate currently housed at the
27 George Bailey Detention Facility located in San Diego, California, and proceeding in pro se,
28 filed a civil rights Complaint pursuant to 42 U.S.C. § 1983. On April 2, 2013, the Court granted
Plaintiff's Motion to Proceed *In Forma Pauperis* ("IFP"), but sua sponte dismissed his
Complaint for failing to state a claim pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A(b). *See*

1 April 2, 2013 Order [ECF No. 10] at 7-8. The Court granted Plaintiff leave to file an Amended
 2 Complaint in order to correct the deficiencies of pleading identified. *Id.* Plaintiff was
 3 specifically cautioned that any Defendant not re-named and any claim not re-alleged in his
 4 Amended Complaint would be considered waived. *Id.* (citing *King v. Atiyeh*, 814 F.2d 565, 567
 5 (9th Cir. 1987)).

6 On April 15, 2013, Plaintiff filed his First Amended Complaint. [ECF No. 12.] However,
 7 before the Court could conduct the required sua sponte screening, Plaintiff filed his Second
 8 Amended Complaint (“SAC”) [ECF No. 19] which omits previously named Defendants San
 9 Diego County Attorney and GBDF. Thus, Plaintiff claims against these Defendants are waived the
 10 and the Clerk of Court is directed to terminate these Defendants from the docket.

11 **II. Screening Pursuant to 28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

12 As discussed in the Court’s previous Orders, because Plaintiff is proceeding IFP and is
 13 a “prisoner” as defined by 28 U.S.C. § 1915(h), the Court must now review his Amended
 14 Complaint sua sponte before service, and dismiss the entire action, or any part of his Amended
 15 Complaint, if it is frivolous, malicious, fails to state a claim, or seeks damages from defendants
 16 who are immune. *See* 28 U.S.C. § 1915(e)(2)(B) and § 1915A; *Lopez v. Smith*, 203 F.3d 1122,
 17 1126-27 (9th Cir. 2000) (en banc) (noting that 28 U.S.C. § 1915(e) “not only permits but
 18 requires” the court to sua sponte dismiss an *in forma pauperis* complaint that fails to state a
 19 claim); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000) (§ 1915A).

20 Before amendment by the Prison Litigation Reform Act (“PLRA”), the former 28 U.S.C.
 21 § 1915(d) permitted sua sponte dismissal of only frivolous and malicious claims. *Lopez*, 203
 22 F.3d at 1126, 1130. An action is frivolous if it lacks an arguable basis in either law or fact.
 23 *Neitzke v. Williams*, 490 U.S. 319, 324 (1989). However, 28 U.S.C. § 1915(e)(2) and § 1915A
 24 mandate that the court reviewing an IFP or prisoner’s suit make and rule on its own motion to
 25 dismiss before effecting service of the Complaint by the U.S. Marshal pursuant to FED.R.CIV.P.
 26 4(c)(3). *See Lopez*, 203 F.3d at 1127; *see also McGore v. Wrigglesworth*, 114 F.3d 601, 604-05
 27 (6th Cir. 1997) (stating that sua sponte screening pursuant to § 1915 should occur “before service
 28 of process is made on the opposing parties”); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th

1 Cir. 1998) (discussing 28 U.S.C. § 1915A).

2 “[W]hen determining whether a complaint states a claim, a court must accept as true all
3 allegations of material fact and must construe those facts in the light most favorable to the
4 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)
5 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”; *Andrews v. King*, 398 F.3d
6 1113, 1121 (9th Cir. 2005). In addition, the Court has a duty to liberally construe a pro se’s
7 pleadings, see *Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988),
8 which is “particularly important in civil rights cases.” *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261
9 (9th Cir. 1992). In giving liberal interpretation to a pro se civil rights complaint, however, the
10 court may not “supply essential elements of claims that were not initially pled.” *Ivey v. Board*
11 *of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

12 **A. Respondeat Superior**

13 It appears that Plaintiff seeks to hold Defendant Gore liable in his supervisory capacity.
14 However, there is no respondeat superior liability under 42 U.S.C. § 1983. *Palmer v. Sanderson*,
15 9 F.3d 1433, 1437-38 (9th Cir. 1993). Instead, “[t]he inquiry into causation must be
16 individualized and focus on the duties and responsibilities of each individual defendant whose
17 acts or omissions are alleged to have caused a constitutional deprivation.” *Leer v. Murphy*, 844
18 F.2d 628, 633 (9th Cir. 1988) (citing *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976)). In order
19 to avoid the respondeat superior bar, Plaintiff must allege personal acts by each individual
20 Defendant which have a direct causal connection to the constitutional violation at issue. See
21 *Sanders v. Kennedy*, 794 F.2d 478, 483 (9th Cir. 1986); *Taylor v. List*, 880 F.2d 1040, 1045 (9th
22 Cir. 1989).

23 Supervisory prison officials may only be held liable for the allegedly unconstitutional
24 violations of a subordinate if Plaintiff sets forth allegations which show: (1) how or to what
25 extent they personally participated in or directed a subordinate’s actions, and (2) in either acting
26 or failing to act, they were an actual and proximate cause of the deprivation of Plaintiff’s
27 constitutional rights. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). As currently pleaded,
28 however, Plaintiff’s Second Amended Complaint fails to set forth facts which might be liberally

1 construed to support an individualized constitutional claim against Defendant Gore. Thus,
 2 Defendant Gore is **DISMISSED** from this action for failing to state a claim upon which relief
 3 may be granted.

4 **B. Fourteenth Amendment claims**

5 Plaintiff alleges Defendant Madsen has not adequately responded to his administrative
 6 grievances in violation of his Fourteenth Amendment due process rights. The Fourteenth
 7 Amendment provides that: “[n]o state shall ... deprive any person of life, liberty, or property,
 8 without due process of law.” U.S. CONST. amend. XIV, § 1. “The requirements of procedural
 9 due process apply only to the deprivation of interests encompassed by the Fourteenth
 10 Amendment’s protection of liberty and property.” *Board of Regents v. Roth*, 408 U.S. 564, 569
 11 (1972). State statutes and prison regulations may grant prisoners liberty or property interests
 12 sufficient to invoke due process protection. *Meachum v. Fano*, 427 U.S. 215, 223-27 (1976).
 13 To state a procedural due process claim, Plaintiff must allege: “(1) a liberty or property interest
 14 protected by the Constitution; (2) a deprivation of the interest by the government; [and] (3) lack
 15 of process.” *Wright v. Riveland*, 219 F.3d 905, 913 (9th Cir. 2000).

16 However, the Ninth Circuit has held that prisoners have no protected *property* interest in
 17 an inmate grievance procedure arising directly from the Due Process Clause. *See Ramirez v.*
 18 *Galaza*, 334 F.3d 850, 869 (9th Cir. 2003) (“[I]nmates lack a separate constitutional entitlement
 19 to a specific prison grievance procedure”) (citing *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir.
 20 1988) (finding that the due process clause of the Fourteenth Amendment creates “no legitimate
 21 claim of entitlement to a [prison] grievance procedure”)); *accord Adams v. Rice*, 40 F.3d 72, 75
 22 (4th Cir. 1994) (1995); *Buckley v. Barlow*, 997 F.2d 494, 495 (8th Cir. 1993).

23 In addition, Plaintiff has failed to plead facts sufficient to show that prison official
 24 deprived him of a protected *liberty* interest by allegedly failing to respond to his prison
 25 grievances in a satisfactory manner. While a liberty interest can arise from state law or prison
 26 regulations, *Meachum*, 427 U.S. at 223-27, due process protections are implicated only if
 27 Plaintiff alleges facts to show that Defendants: (1) restrained his freedom in a manner not
 28 expected from his sentence, and (2) “impose[d] atypical and significant hardship on [him] in

1 relation to the ordinary incidents of prison life.” *Sandin v. Conner*, 515 U.S. 472, 484 (1995);
 2 *Neal v. Shimoda*, 131 F.3d 818, 827-28 (9th Cir. 1997). Plaintiff pleads nothing to suggest how
 3 the allegedly inadequate review and consideration of his inmate grievances resulted in an
 4 “atypical” and “significant hardship.” *Sandin*, 515 U.S. at 483-84. Thus, the Court dismisses
 5 Plaintiff’s Fourteenth Amendment claims and Defendant Madsen for failing to state a claim
 6 upon which relief may be granted.

7 **C. Monell liability**

8 Plaintiff also, once again, names the County of San Diego as a Defendant. “[A]
 9 municipality cannot be held liable solely because it employs a tortfeasor – or, in other words, a
 10 municipality cannot be held liable under § 1983 on a respondeat superior theory.” *Monell v.*
 11 *Department of Social Services*, 436 U.S. 658, 691 (1978). A municipality may be liable under
 12 § 1983 for monetary, declaratory, or injunctive relief where the constitutional deprivation was
 13 caused by the implementation or execution of “a policy statement, ordinance, regulation, or
 14 decision officially adopted and promulgated by that body’s officers.” *Monell*, 436 U.S. at 690;
 15 *Board of the County Commissioners v. Brown*, 520 U.S. 397, 117 S. Ct. 1382, 1388 (1997);
 16 *Navarro v. Block*, 72 F.3d 712, 714 (9th Cir. 1995).

17 To establish municipal liability, plaintiff must show: (1) he was deprived of a
 18 constitutional right; (2) the city had a policy; (3) the policy amounted to deliberate indifference
 19 to plaintiff’s constitutional right; and (4) the policy was the “moving force behind the
 20 constitutional violation.” *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 835 (9th Cir. 1996); *see*
 21 *Board of the County Commissioners v. Brown*, 520 U.S. 397, 117 S. Ct. at 1388; *Trevino v.*
 22 *Gates*, 99 F.3d 911, 918 (9th Cir. 1996). Thus, in order to state a § 1983 claim against the City
 23 or County of San Diego, Plaintiff must allege facts showing that his injury was caused by
 24 individual officers whose conduct conformed to an official city policy, custom or practice. *See*
 25 *Karim-Panahi*, 839 F.2d at 624. Plaintiff has failed to allege any such facts and thus, the Court
 26 dismisses the claims against the County of San Diego for failing to state a claim upon which
 27 relief may be granted.

28 ///

D. Remaining claims

The Court finds that the remaining Eighth Amendment¹ and First Amendment retaliation claims found in Plaintiff's Second Amended Complaint are now sufficiently pleaded to survive the sua sponte screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Therefore, the Court will direct U.S. Marshal service on his behalf. *See Lopez*, 203 F.3d at 1126-27; 28 U.S.C. § 1915(d) ("The officers of the court shall issue and serve all process, and perform all duties in [IFP] cases."); FED.R.CIV.P. 4(c)(3) ("[T]he court may order that service be made by a United States marshal or deputy marshal ... if the plaintiff is authorized to proceed *in forma pauperis* under 28 U.S.C. § 1915."). Plaintiff is cautioned, however, that "the sua sponte screening and dismissal procedure is cumulative of, and not a substitute for, any subsequent Rule 12(b)(6) motion that [a defendant] may choose to bring." *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007).

III. CONCLUSION AND ORDER

Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

1. Defendants San Diego County Attorney and GBDF are **DISMISSED** without prejudice. *See King*, 814 F.2d at 567. The Clerk of Court is directed to terminate these Defendants from the docket.

2. Defendants Gore, Madsen and San Diego County are **DISMISSED** from this action for failing to state a claim upon which relief may be granted. The Clerk of Court is directed to terminate these Defendants from the docket.

IT IS FURTHER ORDERED that:

3. The Clerk shall issue a summons as to Plaintiff's Second Amended Complaint [ECF No. 19] upon Defendants Yarling, Baker and White, and shall forward it to Plaintiff along with a blank U.S. Marshal Form 285 for each of these Defendants. In addition, the Clerk shall provide Plaintiff with a copy of this Order, the Court's April 2, 2013 Order granting Plaintiff

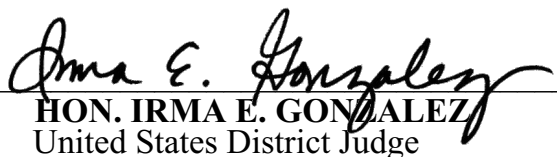
¹ It is not clear whether Plaintiff is a prisoner or a pre-trial detainee at the time the events alleged in this action occurred. However, the Ninth Circuit has held that a "pretrial detainees' rights under the Fourteenth Amendment are comparable to prisoners' rights under the Eighth Amendment," and therefore, "the same standards apply." *Frost v. Agnos*, 152 F.3d 1124, 1128 (9th Cir. 1998)

1 leave to proceed IFP [ECF No. 10], and copies of his Second Amended Complaint and the
2 summons for purposes of serving each Defendant. Upon receipt of this "IFP Package," Plaintiff
3 is directed to complete the Form 285s as completely and accurately as possible, and to return
4 them to the U.S. Marshal according to the instructions provided by the Clerk in the letter
5 accompanying his IFP package. Thereafter, the U.S. Marshal shall serve a copy of the Second
6 Amended Complaint and summons upon each Defendant as directed by Plaintiff on each Form
7 285. All costs of service shall be advanced by the United States. *See* 28 U.S.C. § 1915(d);
8 FED.R.CIV.P. 4(c)(3).

9 4. Defendants are thereafter **ORDERED** to reply to Plaintiff's Second Amended
10 Complaint within the time provided by the applicable provisions of Federal Rule of Civil
11 Procedure 12(a). *See* 42 U.S.C. § 1997e(g)(2) (while Defendants may occasionally be permitted
12 to "waive the right to reply to any action brought by a prisoner confined in any jail, prison, or
13 other correctional facility under section 1983," once the Court has conducted its sua sponte
14 screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b), and thus, has made a preliminary
15 determination based on the face on the pleading alone that Plaintiff has a "reasonable
16 opportunity to prevail on the merits," Defendants are required to respond).

17 5. Plaintiff shall serve upon Defendants or, if appearance has been entered by
18 counsel, upon Defendants' counsel, a copy of every further pleading or other document
19 submitted for consideration of the Court. Plaintiff shall include with the original paper to be
20 filed with the Clerk of the Court a certificate stating the manner in which a true and correct copy
21 of any document was served on Defendants, or counsel for Defendants, and the date of service.
22 Any paper received by the Court which has not been filed with the Clerk or which fails to
23 include a Certificate of Service will be disregarded.

24
25 DATED: May 31, 2013


HON. IRMA E. GONZALEZ
United States District Judge